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Supreme Court of the United States

October Term, 1949

No. 54

UNITED STATES OF AMERICA *ex rel.*, ELLEN KNAUFF,
Appellant,

against

EDWARD J. SHAUGHNESSY, Acting District Director of Immigration and Naturalization Service,
Appellee.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITNONER-APPELLANT'S REPLY MEMORANDUM

The new Executive Order 2850 of August 17, 1949 and the purported Exclusion Order of October 19, 1949 do not influence the legal status of appellant.

Appellee claims under "I" of his answering memorandum, pp. 18 to 21, that appellant's contention that the exclusion order of October 6, 1948 was inconsistent with Presidential Proclamation 2523 has become moot.

Appellee indirectly admits that the order of October 6, 1948, excluding appellant from the United States, was not authorized by Proclamation 2523 in its original form (see pp. 55-57 of Petitioner's Brief of September 20, 1949). To remedy this defect at this late hour a new proclamation,

Number 2850 (Pet. Brief of September 20, p. 62), was procured which provided that the Attorney General now may exclude suspicious aliens without concurrence of the Secretary of State. Proclamation 2850 of August 17, 1949 also provides that "all existing regulations promulgated under or pursuant to the said Proclamation No. 2523 are hereby ratified and confirmed and shall be construed to have the same effect as if included in such proclamation." To make the adverse situation created by this new administrative step conclusive, appellee further claims that the present Attorney General, Mr. McGrath, issued a new exclusion order of October 19, 1949, set forth on p. 68 of appelle's brief.

Our objections to these new administrative steps are as follows:

A. Can the respondent at this late hour change the position of the appellant and of her husband by creating new administrative fiats with retroactive effect? We believe the answer must be "No".

B. Does the ratification of Sections 175.52 to 175.57 C. F. R., Title 8, by new executive order make these regulations valid, if they were not valid before? We believe the answer should be "No".

C. The new exclusion order of October 19, 1949 was never served.

A.

The new Proclamation 2850 of August 17, 1949 purports retroactively to exclude this alien who heretofore was illegally treated as excluded, but in fact in the United States. Is such retroactive rule making permissible?

The general rule is that a statute will not be given retroactive effect if such result can be avoided (*U. S.* v. *Moore*, 1877, 95 U. S. 760), but that express retrospective

provisions of a statute will be enforced (*Pauley* v. *Crawford*, 1898, 84 F. 942).

These rules, however, do not authorize the President to issue retroactive exclusion rules under the Passport Act of 1918 as amended (Appellant's brief, p. 42). Insofar as this appellant is concerned, justice commands that she must be treated under the administrative rules, if valid, as they were on the books in August 1948 when she arrived and applied for admission.

The War Brides Act of 1945 provides that war brides have to be admitted if they make application for admission prior to December 28, 1948 (Sec. 1 of Act of Dec. 28, 1945, appellant's brief p. 49). If appellant could now in 1949 be excluded under a new proclamation of the President and an order of the Attorney General issued thereunder, as appellee tries to do, she could be retroactively deprived of privileges she had already acquired. Such extraordinary retroactive powers to exclude have never been granted the President, and his proclamation as well as the exclusion order of Mr. McGrath of October 19, 1949, are therefore not authorized by statute and void. This argument is so much more forceful since this retroactive step tends to annihilate Mr. Knauff's rights under the War Brides Act. The Passport Act of 1918 did not envisage such arbitrary acts.

B.

The ratification of Sections 175.52 to 175.57 C. F. R. Title 8, is without legal effect. Section 4 of the Administrative Procedure Act of 1946 (A. P. A.) provides:

> "Sec. 4. Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts—

(a) Notice. — General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a dscription of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."

"Rule making" is defined in Sec. 2 (c) A. P. A. as follows:

"(c) Rule and rule making. — "Rule" means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing upon any of the foregoing. "Rule making" means agency process for the formulation, amendment, or repeal of a rule."

We conclude that 8 C. F. R. 175.52 to 175.57 could be re-enacted only pursuant to the procedure outlined in Section 4 C. F. R. This procedure was not followed in this case. No proposed rule under the new executive order nor any final rule made thereunder was ever published in the Federal Register.

C.

Appellant was never served with the exclusion order of October 19, 1949. This order remained *in petto* of the Attorney General until revealed to appellant's counsel by appellee's brief, and therefore never became effective.

We feel that the highly defective steps taken by the appellee at this late hour to stave off defeat in this case betray confusion and a desire to achieve by indirection what by direction could not be achieved, and we pray that this court will not tolerate such artifice.

CONCLUSION

This court is respectfully asked to consider that the recent war had created a tendency to change the political structure of the country. The magnitude of the danger to which the country was exposed, together with the shock the public conscience received on the day of infamy, the day of Pearl Harbor, have prompted all public minded citizens to endure cheerfully the temporary loss of many inherited liberties. The sweeping powers delegated to the Chief Executive and his cabinet members, on the other hand, have had the inevitable result of turning many of our public official into petty tyrants who try to enlarge the domain of their official powers by devious means.

This case is an example of this tendency. The Passport Act of 1918 that was considered by President Wilson as authority to insist on certain documentary requirements for

people who desired to enter and leave the United States is tortured twenty-five years later into repressive rules giving cabinet officers power arbitrarily to exclude aliens on the pretense that they are subversive. The *raison d'état* is invoked to abolish all vestiges of procedural decency. Whenever an act of tyranny is challenged, the office holders appear, waving the flag, and shouting that the republic is in danger. Malicious informers rule the day.

The War Brides Act was ordained by Congress to give our soldiers a right to the admission of their wives if the latter were "otherwise admissible under the immigration laws." This language clearly shows that only war brides excludable as criminals, prostitutes, anarchists, etc. (Sec. 3, Immigration Act of 1917, as amended; 8 U. S. C. 136, 137) were denied admission, and that exclusion of war brides could only be ordered pursuant to the exclusion procedure of Sections 16, 17 and 18 (8 U. S. C. 152, 153, 154) of the Immigration Act of February 5, 1917, as amended. Exclusion by executive fiat, without a hearing, without counsel, without charges and public evidence was not envisaged by the immigration laws and therefore does not apply to war brides.

To state the same idea in other words: Neither the Passpost Act of 1918 as amended, nor the Executive Orders 2523 and 2850, or the regulations issued thereunder, are "Immigration Laws" in the meaning this term was given in the language of the War Brides Act.

Mrs. Ellen Knauff, the appellant, and Mr. Kurt Knauff, her husband, whose faithful services to the United States of America have been certified, approach this Court, protesting their loyalty to the United States, to its Constitution, and to all ideals that are dear to Americans. They clamor that appellant's exclusion was unjustified, that she is neither

a communist nor an anarchist, and that she rendered no services to any Czech government past or present. They pray for a chance to show their true character to any unbiased and fair tribunal.

Respectfully submitted,

GUNTHER JACOBSON,
Attorney for Appellant.

December 5, 1949.